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NO. 87-1729 and NO. 88-45

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1987
CAPLAN & DRYSDALE, CHARTERED,
PETITIONER
v.
UNITED STATES OF AMERICA,
RESPONDENT

October Term, 1988
UNITED STATES OF AMERICA
RESPONDENT
v.
PETER MONSANTO
PETITIONER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT SECOND CIRCUIT

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES OF AMERICA

Appellate Committee of the California
District Attorneys Association

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Amicus Curiae, the Appellate Committee of the California District Attorneys Association, and Ira Reiner, District Attorney of Los Angeles County, are filing this brief accompanied by the written consent of all parties to the above consolidated cases pursuant to Rule 36(2), RULES of the SUPREME COURT of the UNITED STATES.

INTEREST OF AMICUS CURIAE

The Appellate Committee of the California District Attorneys Association is a committee created by the district attorneys of California. It was organized in order to utilize and coordinate the resources of the offices of district attorneys throughout the State, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal offenses. Upon review of the instant matter, the Committee has decided to file an *amicus curiae* brief herein. The Office of the District Attorney of the County of Los Angeles is an authorized law officer of the County, which is a political subdivision of the State of California. *See* Rule 36(4).

In California, a civil forfeiture statute applicable to drug trafficking is in effect. CALIFORNIA HEALTH and SAFETY CODE, §§ 11470 *et seq.* (West 1989). There is no requirement that there be a related criminal action. *Id.*, § 11484.4, subd.(i). However, the issue of forfeiture may be tried in conjunction with the criminal action, but upon motion of either the defendant-claimant or the prosecution, the forfeiture hearing can be continued until after the criminal charge has been resolved. *Id.*, §§ 11484.4, subd.(i); 11488.5, subd.(e). The Attorney General of the State of California or the District Attorney of the county involved is responsible for the filing and maintaining of asset forfeiture proceedings. *Id.*, § 11488.l. If a forfeiture petition is filed, a defendant in an underlying or related criminal action who is a claimant in the forfeiture proceeding is entitled to move, unless he has already pleaded guilty or nolo contendere, for the return of the seized assets upon the ground that probable cause is lacking to believe they are subject to forfeiture. *Id.*, § 11484.4, subd.(g)(2). Similarly, where there is no underlying or related criminal action, a claimant is entitled to a probable cause determination no sooner than 10 days after a forfeiture petition is filed. *Id.*, §

11484.4, subd.(g)(1). Moreover, where a forfeiture petition has been filed with respect to unseized assets, the prosecuting attorney may seek protective orders. However, such protective orders (except a temporary restraining orders) may issue only after notice and hearing. It must be determined that there is probable cause to believe they are properly forfeitable. *Id.*, §§ 11484.4, subd.(b); 11492, subd.(b).

The California Court of Appeal held in *People* v. *Superior Court (Clements)*, 200 Cal.App.3d 491, 246 Cal.Rptr. 122 (1988), that the constitutional right of counsel in a criminal case is not violated by denial of access to seized assets pending forfeiture proceedings. The court noted that there was statutory provision for a defendant to move for the return of seized assets upon the ground that probable cause to believe such assets were forfeitable was lacking.[1]

Clearly, the Association and its membership have a vital interest in urging this Court to hold that the constitutional right to counsel in a criminal case does not require that assets otherwise subject to forfeiture are exempt to the extent needed to pay legitimate attorney fees.

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1. CALIFORNIA HEALTH and SAFETY CODE § 11484.4, as it then read, did not require that a forfeiture petition be pending when the defendant in the criminal action is entitled to make a motion for return of property upon the ground of a lack of probable cause to believe the item seized is forfeitable. *People* v. *Superior Court (Clements)*, *supra*, 200 Cal.App.3d at 495 n. 3.

SUMMARY OF ARGUMENT

The basic issue in these cases is whether a defendant in a criminal case is entitled to have access to his property, which has been seized or otherwise detained by the government pending a forfeiture proceeding, in order to pay legitimate attorney fees. We contend that a defendant should not have access to such property at least where there has been a judicial determination that there is probable cause to believe that the property in question will ultimately be forfeited.[2] A defendant has no more right to pay a lawyer with what is believed upon probable cause to be the proceeds of criminal activities than with what is believed upon probable cause to be stolen property.

It is well settled that the interest of a person in his liberty is not unconstitutionally denied when he is subject to significant pretrial restraint where there has been a judicial determination that there is probable cause to support his detention. Similarly, the interest of a person in his property should not be deemed to be unconstitutionally denied when such property is subject to significant pretrial restraint where there has been a judicial determination that there is probable cause to support such restraint.[3]

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2. We understand that both the petitioner in *Caplan & Drysdale* and the respondent in *Monsanto* urge that the Sixth Amendment is violated by denial of access to seized assets in order to pay a defendant's attorney fees whether or not a pretrial probable cause determination as to forfeitability is authorized by federal statute.

3. We do not mean to imply that a probable cause determination that a defendant's property is ultimately forfeitable is constitutionally required by the Sixth Amendment. It is simply unnecessary for us as *amicus curiae* to urge that point in light of the statutory scheme in California which might be impacted by this Court's decision in the cases at bar.

ARGUMENT

THE CONSTITUTIONAL RIGHT TO COUNSEL IN CRIMINAL CASES IS NOT VIOLATED BY DENIAL OF ACCESS TO SEIZED OR OTHERWISE DETAINED ASSETS FOR THE PURPOSE OF PAYING ATTORNEY FEES AND EXPENSES WHERE THERE HAS BEEN A PRETRIAL PROBABLE CAUSE DETERMINATION THAT SUCH ASSETS ARE SUBJECT TO FORFEITURE

Our position is that the Sixth Amendment right to counsel in a criminal case is not violated by the denial of access to seized or otherwise detained assets for the purpose of paying attorney fees where there has been a judicial probable cause determination that the detained assets are subject to forfeiture.

This Court has held that pre-seizure notice and hearing is not constitutionally required in order for the government to seize an asset used for unlawful purposes and which is subject to forfeiture. *Caldero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) On the other hand, due process of law requires that the delay between the seizure and the initiation of a civil forfeiture proceeding be justified by a balancing test, analogous to that used to determine speedy trial challenges as set forth in *Barker* v. *Wingo*, 407 U.S. 514 (1972). This test involves the weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. *United States* v. *$8,850*, 461 U.S. 555, 564-565 (1983). In determining what test applies to such delays, this Court explained that "the Fifth Amendment claim here. . . mirrors the concern of undue delay encompassed in the right to a speedy trial." *Id.*, at 564.

Of significance, for our purposes, is the observation by this Court: "The deprivation in *Barker* - loss of liberty - may well be more grievous than the deprivation of one's use of property at issue here. Thus, the balance of the interests which depends so heavily on the context of the particular situation, may differ from a situation involving the right to a speedy trial." *Id.*, at 565 n. 14.

The *dictum* in *United States* v. *$8,850*, that the "deprivation in *Barker* - loss of liberty - may well be more grievous than the deprivation of one's use of property at issue here" (461 U.S. at 565 n. 14), suggests the proper analysis which permits resolution of the Sixth Amendment issues raised in *Caplan & Drysdale* and *Monsanto*.

In *Gerstein* v. *Pugh*, 420 U.S. 103, 118-119 (1975), this Court confirmed the rule that a judicial hearing is not a prerequisite to prosecution by information. However, this Court held in *Gerstein* that a person arrested and held for trial under a prosecutor's information is constitutionally entitled to a judicial determination of probable cause for pretrial restraint of liberty, specifying that an adversary hearing is not required. In so doing, this Court acknowledged that "[t]o be sure, pretrial custody may affect to some extent the defendant's ability to assist in preparation of his defense." *Id.*, 420 U.S. at 123. Replying to the objection that "the Court's choice of the Fourth Amendment as the rationale for decision and suggests that the Court offers less protection to a person in jail than it requires in certain civil cases" (*id.*, 420 U.S. at 125 n.27), the Court succinctly explained:

> Here we deal with the complex procedures of a criminal case and a threshold right guaranteed by the Fourth Amendment. The historical basis of the probable cause requirement is quite different from the relatively ~~recent~~ application of variable procedural

> due process in debtor-creditor disputes and termination of government-created benefits. The Fourth Amendment was tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the "process that is due" for seizures of person or property in criminal cases, including the detention of suspects pending trial.

Ibid.

Subsequently, in *Baker* v. *McCollan*, 443 U.S. 137, 143 (1979), this Court confirmed: "Since an adversary hearing is not required [for the probable cause determination with respect to any significant pretrial restraint of liberty], and since the probable-cause standard for pretrial detention is the same as that for arrest, a person arrested pursuant to a warrant issued by a magistrate on a showing of probable cause is not constitutionally entitled to a separate judicial determination that there is probable cause to detain him pending trial." [Fn. omitted. Bracketed matter inserted.]

This Court wisely recognized in *Gerstein* "that state systems of criminal procedure vary widely [and that] [t]here is no single preferred pretrial procedure, and the nature of the probable cause determination usually will be shaped to accord with a State's pretrial procedure viewed as a whole." *Id.*, 420 U.S. at 123.

The California Court of Appeal approved the statutory scheme, authorizing a pretrial judicial determination of probable cause to detain property subject to forfeiture notwithstanding a defendant's Sixth Amendment claims, in *People* v. *Superior Court (Clements), supra*, precisely upon the ground that "[p]retrial deprivation of liberty or property on a showing of probable cause is not an unknown means of securing a compelling interest." *Id.*, 200 Cal.App.3d at 500.

If, as *Gerstein* teaches us, a defendant is constitutionally entitled to no more than a probable cause determination in order to justify his continued custody or subjection to some other significant restraint pending trial, it must be the case that he is constitutionally entitled to no more than a probable cause determination in order to justify detention of his property subject to forfeiture prior to the forfeiture hearing on the merits.[4]

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4. 21 U.S.C. § 853(e)(1)(B), which authorizes protective orders prior to the filing of an indictment or information, establishes criteria in addition to probable cause (assuming that probable cause is the equivalent of a "substantial probability that the United States will prevail on the issue of forfeiture") which require balancing of specified interests. Moreover, the hearing contemplated in subsection (e)(1)(B) is adversarial. Similarly, § 853(f), which authorizes warrants for the seizure of forfeitable property, requires in addition to a determination of "probable cause to believe that the property to be seized would, in the event of a conviction, be subject to forfeiture and that an order under subsection (e) of this section may not be sufficient to assure the availability of the property for forfeiture." Interestingly enough, the federal statute requires that a warrant pursuant to subsection (f) must be based upon probable cause, whether or not it is issues before or after the filing of an indictment or information. Subsection (e)(1)(A), which authorizes post-indictment or post-information protective orders, does not expressly require a finding of a "substantial probability that the United States will prevail on the issue of forfeiture."

It is noteworthy that the *Monsanto* panel majority concluded that notice and an adversarial hearing are constitutionally required where the question of attorney fees is implicated with respect to post-indictment or post-information restraining orders as a matter of Fifth Amendment due process or by virtue of the Sixth Amendment. The government has the burden of establishing the probability that the defendant will be convicted at trial and that the properties in question will be subject to forfeiture. *United States* v. *Monsanto*, 836 F.2d at 82-85 (2d Cir. 1988), *rev'd*. 852 F.2d 1400 (2d Cir.1988), *cert. granted*, No. 88-484 (Nov. 7, 1988).

CONCLUSION

The Sixth Amendment does not entitle a defendant to more than a pretrial probable cause determination as to the forfeitability of property seized or otherwise detained for forfeiture proceedings even though the defendant desires access to such property for the purpose of paying attorney fees and expenses.

Respectfully submitted on behalf of the
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